

**BEFORE THE INDIANA  
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of M.K., and the	)	
Brownsburg Community School	)	
Corporation and West Central Joint	)	<b>Article 7 Hearing No. 1402.04</b>
Services	)	
	)	
Appeal from a Decision of	)	
Joseph R. McKinney, J.D., Ed.D.,	)	
Independent Hearing Officer	)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

**Procedural History and Background**

The Student's<sup>1</sup> request for a due process hearing was received by the Indiana Department of Education, Division of Exceptional Learners, on January 15, 2004. On January 15, 2004, Joseph R. McKinney, J.D., Ed.D., was appointed by the State Superintendent of Public Instruction as the Independent Hearing Officer (IHO).

In the notification letter of the pre-hearing conference, dated February 4, 2004, the IHO granted the Student's request for an extension of time. The new decision deadline was extended to March 19, 2004. On February 13, 2004, a telephonic pre-hearing conference was conducted. At the conference, the due process hearing was scheduled for March 8 and 15, 2004. Two additional dates, April 28 and 29, 2004, were subsequently added. During the conference, the Student requested that the IHO hear issues in regards to Section 504 of the Rehabilitation Act of 1972. However, the School<sup>2</sup> objected to the Student's request. In the amended pre-hearing

---

<sup>1</sup> Student refers to both the Student and the Parent

<sup>2</sup> Brownsburg Community School Corporation and West Central Joint Services will be referred to collectively as the "School."

order<sup>3</sup> dated February 24, 2004, the IHO determined that he will not address separate Section 504 issues. Additionally, the pre-hearing order identified six issues for hearing:

1. Whether the School failed in its “child find” duties to timely and properly evaluate the child and timely and properly identify the child as being in need of special education or related services.
2. Whether the School failed to devise an appropriate IEP for the child, taking into account the child’s high IQ but extremely low performance last year, which has been partially remediated because of the Parents’ outside assistance, a need for a functional behavior assessment, a behavior intervention plan, assistive technology, tutoring, Extended School Year Services and counseling.
3. Whether the School should be ordered to reimburse the Parents for the costs of tutoring the child and transportation expenses.
4. Whether the School failed to share the child’s initial evaluation with the Parents five days prior to the case conference committee meeting.
5. Whether the School failed to give the Parents prior written notice about the reasons why their various requests for educational testing, services and placement were denied.
6. Whether the Student is entitled to compensatory education services (as a remedy).

The hearing was open to the public and conducted on March 8 and 15, 2004 and on April 28 and 29, 2004. In a letter dated March 9, 2004, the Student by counsel requested an extension of time. The IHO granted the motion extending the decision deadline to May 21, 2004. Furthermore, the IHO noted in his decision that the parties agreed to a weekend extension of the decision deadline to May 24, 2004.

### **The IHO’s Written Decision**

The IHO issued his written decision on May 24, 2004. The IHO determined seventy (70) Findings of Fact.<sup>4</sup>

### ***The IHO’s Findings of Fact***

1. This matter was properly assigned to this IHO pursuant to the Administrative Orders and Procedures Act (AOPA), IC 4-21.5 *et seq.*, and 511 IAC 7-30-3, which give the IHO the authority to hear and rule upon all matters presented.
2. All Findings of Fact which can be deemed Conclusions of Law are hereby deemed Conclusions of Law. All Conclusions of Law which can be deemed Findings of Fact are hereby deemed Findings of Fact.

---

<sup>3</sup> The original pre-hearing order dated February 17, 2004 was amended because of the mistake made to issue two (2). After determining that he would not hear issues regarding Section 504, the IHO mistakenly failed to delete that issue in two (2).

<sup>4</sup> The IHO’s decision is reproduced in its entirety. It is edited only as to format. The substance of the IHO’s decision remains intact.

3. The Student is approximately 8 years and 5 months of age (date of birth: October 30, 1995).
4. The Student attended kindergarten at a private Baptist school.
5. The Student enrolled and attended first grade at Eagle Elementary in the school district and is currently in second grade at the school.
6. Since the Student attended kindergarten at a private school, the School conducted an educational screening to assess the Student's basic academic skills as he entered first grade. The Student earned scores in the average range in 4 of 6 academic areas that were tested. He scored slightly below grade level on passage comprehension (K.7) and well above grade level in calculation (2.1) and applied problems (2.6). The licensed school psychologist said these scores were not unusual for a child entering first grade coming from a private school.
7. The Student's first grade teacher, who also has a reading endorsement, said (at the hearing) that the Student loved to learn and share his learning with others. The first grade teacher described the Student as very bright. She indicated he made a lot of progress during the year and "was successful in first grade." (Tr. p. 699)
8. The Student did not have behavior related discipline problems in first grade.
9. The Student did have problems with handwriting and maintaining attention in first grade.
10. The first grade teacher said the Student's problems with handwriting were more with mechanics than with ability to express himself. She said the Student's handwriting was difficult to read and not on line, up and down.
11. The Mother contacted the School in February, 2003 and talked by phone with the school psychologist and indicated she wanted to help her son at home with his schoolwork. The school psychologist indicated that there were tutors in the area that could provide assistance to her and the Student. The school psychologist recommended an excellent tutor. The Parents contacted the tutor in February.
12. The Student began seeing the tutor on March 1, 2003.
13. The tutor, who is a licensed teacher and has a degree in educational psychology, but who is not a licensed school psychologist, conducted testing on the Student on March 1, 2003.

14. The tutor administered the Gibson Cognitive Battery and the Evaluation of Basic Skills. The Student scored below age level in spelling, reading, math and auditory processing and selective attention. He scored above age level in “processing speed,” “working memory,” “visual processing,” “word attack,” “logic and reasoning,” and “word identification.”
15. The Student’s first semester grades were Reading “S+,” Handwriting “S,” Social Studies “S+,” Math “S+,” Health “S+,” and Physical Education “S.”
16. The Mother contacted the school psychologist by telephone on March 10, 2003 to request an evaluation based on academic struggles that she and the Father observed at home in the area of language arts.
17. The Mother believes that she requested an evaluation on February 10, 2003. It is clear that she spoke to the school psychologist in February about finding a tutor; however, the school psychologist’s testimony, which is corroborated by his personal written records, shows that the Mother first requested an evaluation during their telephone conversation on March 10, 2003. This request would have followed the tutor’s testing that showed some deficits by just a few days.
18. Since the Mother requested an evaluation by the telephone on March 10, 2003, but did not meet with the School until March 20, 2003, the Parents were permitted to date the consent form for an evaluation as March 10, 2003.
19. A staffing meeting was held on March 20, 2003, which was attended by the Parents, the Student’s private tutor, the school psychologist, the first grade teacher and the principal. The Parents were provided with the Notice of Procedural Safeguards.
20. At the staffing meeting, prior to the Student’s evaluation, the Mother reported that reading, written expression and spelling were difficult for the Student at home. She said the Student was spending around an hour on homework and needed the assistance of his Parents to complete the homework. The Mother also indicated that the Student added letters to words and sometimes wrote s, k, 2, 5, and 7 backwards. She also indicated he had not been diagnosed with ADD at that time.
21. The Student’s first grade teacher indicated that she had seen word reversals by the Student on occasion in her classroom, but that was not unusual for first graders. However, for purposes of the March 20, 2003 meeting, her most significant concern was the Student’s problems with handwriting and maintaining his focus during instruction.

22. At the time of the March 20<sup>th</sup> meeting (3<sup>rd</sup> grading period) the Student's grades were: Reading – 90% (“B”), English – 95% (“A-“), Spelling – 99% (“A+”), Handwriting (“S-“), Social Studies (“S”), Math – 96% (“A-“), Science (“S+”), and Health (“S+”).
23. A General Education Intervention Plan (GEI) was written for the Student at the March 20, 2003 meeting. The School and Parents agreed on a list of seven (7) accommodations. The teacher had used most of these accommodations for the Student all school year and completed the year using all of the accommodations. The principal, teacher, and assistant principal agreed that these accommodations were usual for Students with GEIs (i.e., extra time to complete written work).
24. The first grade teacher administered an analytical reading inventory to all of her students in October and again in April. On October 21, 2002, the Student earned scores that placed him at the primer level in reading for both word recognition and comprehension. On April 24, 2003 when he was re-tested he was reading at a third grade level instructionally for word recognition and at a third grade level independently for comprehension.
25. The Student gained three (3) grade levels in reading in six (6) months. The tutor had only worked with the Student for 10 hours during this time.
26. The school psychologist's psychoeducational evaluation was conducted over four (4) days. The Student was administered the Wechsler Intelligence Scale for Children: Third Edition (WISC-111). He obtained a full Scale I.Q. score of 130, which falls within the very superior range. His Verbal Scale I.Q. was 127 (superior range) and his Performance Scale I.Q. was 129 (superior range). The 2 points difference in scores is not significantly different indicating he is equally adapt at expressing his intelligence through verbal and non-verbal means.
27. Testing of the Student's perceptual and motor skills indicated that he was performing at age level.
28. The Student was given the Wechsler Individual Achievement Test, 2<sup>nd</sup> Edition (IWAT-II) and the reading and spelling parts of the Woodcock-Johnson III Tests of Achievement (WJ-III) to assess his academic achievement levels. The results of these tests indicated academic skill levels that were at or above grade level in all areas.
29. The Student's achievement test results indicated that his reading skills ranged from the 2.3 to 2.6 grade level (he was tested at the end of 1<sup>st</sup> grade). His comprehension skills ranged from 2.2 to 3.8 grade levels. His ability to decode nonsense words was at the 2.9 grade level. Spelling and written expression skills were into the second grade level. Math scores were at the

upper second to mid-third grade level. The Student's listening comprehension scores were in the superior range and at the fourth grade level.

30. The Student was administered the SCAN-C Tests for Auditory Processing Disorders in Children-Revised. His overall composite score fell solidly in the normal range.
31. The first grade teacher, her instructional assistant, and the Student's Parents completed the Hawthorne Attention Deficit Disorder Evaluation Scale (ADDES). The results all fell within the average range on a hyperactive-impulsive scale. The Mother and instructional assistant reported normal scores on the inattentive scale. The first grade teacher and Father reported scores that indicated at risk or mildly significant elevations on the inattentive subscale.
32. A case conference committee meeting (CCC) was held on May 30, 2003 (the last contract day of school). The 60-day deadline for holding the CCC was September 3, 2003. A Notice of the CCC was sent to the Parents on May 20, 2003.
33. The Parents were informed by the school psychologist that he had not completed the evaluation report on May 28, 2003. He offered to wait until the beginning of the next school year to hold the CCC so the Parents could have at least five (5) days to review the evaluation report before the CCC. The Parents declined the offer and the CCC was held on May 30, 2003. They were provided with the evaluation on May 29, 2003.
34. The CCC was attended by the Parents, the Student's private tutor, the first grade teacher, a LD teacher, the principal, and the school psychologist.
35. The CCC listened to input from the Parents. They discussed the evaluation results and listened to the Student's first grade teacher and his tutor. The Student was found ineligible by the CCC for special education services. A staffing was scheduled for early fall to outline accommodations needed for the second grade classroom.
36. The Mother contacted Ms. Kroeger, Director of Pupil Services, on August 26, 2003, and complained that the Student was in a Spanish class. She asked that he be removed from the class. All children in the Student's second grade class were taking Spanish one time per week for 40 minutes. The School exempted the Student from the class. At the Mother's request the private tutor was allowed to tutor the Student at school during the period when the other second graders were taking Spanish.
37. A GEI meeting was held on September 10, 2003. The Student was now in second grade. The assistant principal set up the meeting. A GEI was

developed that included the same accommodations the Student had in first grade. In addition, it was noted the Student would not take Spanish.

38. The Parents requested an independent educational evaluation (IEE). The School agreed to pay for the IEE. The Mother requested Dr. Melody Dilk to conduct the IEE. The School contacted Dr. Dilk who said she could not do the evaluation since she was now serving as an Article 7 IHO. She referred the School to Dr. Couvillion.
39. Dr. Couvillion met with the Student and Parents on October 14, 2003, to gather information. His assistant, Ms. Mummert conducted educational testing in a 4-hour session on November 6, 2003, with the Student. The assistant administered several tests to the Student. No I.Q. testing was conducted for this evaluation.
40. Dr. Couvillion did not speak to any of the Student's teachers as part of his evaluation. His assistant conducted the Wide Range Assessment of Memory and Learning, Bender Visual-Motor Gestalt Test, Ray Oesterrich Complex Figure Task, Handwriting Sample, Gray Oral Reading Test-4<sup>th</sup> Ed., Gordon Diagnostic System of Attention, Aphasia Screening Test, and Connor's Behavior Rating Scales.
41. Dr. Couvillion concluded that the Student's primary difficulties appeared to be "dysgraphia in nature" of a moderate to severe degree. He reported that the Student's handwriting was extraordinarily poor. He indicated that in a number of areas the Student had made important gains in reading. However, according to Dr. Couvillion the Student continued to display important weaknesses in reading decoding and work calling.
42. Dr. Couvillion testified that he could not conclude that the Student has a learning disability in reading. Dr. Couvillion reported there were no important deficits in reading or spelling.
43. Dr. Couvillion found that the results of the Rey Desterreich Complex Figure Task and the Bender-Gestalt Visual Motor test were consistent with those in children with attention difficulties. The Mother's response to the Connor's rating scale (ADD/ADHD) resulted in scores of average for attention and anxiety. Dr. Couvillion concluded that the Student had important attentional disorders, perhaps secondary to anxiety.
44. The Student's second grade teacher did not observe unusual anxiety or any emotional problems with the student in her classroom.
45. In a telephone conversation with Dr. Couvillion in January, before a CCC meeting, he told Ms. Kroeger that "he felt that the Mother was a source of

emotional concern and that the Student fed off of her emotions, so that some of his anxiety was caused by Mother's anxiety." (Tr. p. 141).

46. Dr. Couvillion also suggested to Jan Kroeger that the upcoming CCC be tape recorded because, "He was concerned because there had been times that Mother had misquoted him or misinterpreted some of the things that he had said...."
47. A CCC meeting was held on January 14, 2004. The Parents brought a letter to the CCC meeting from Dr. Poulos dated January 8, 2004 that said recent testing of the Student revealed that he had ADHD and severe dysgraphia. The pediatrician also wrote that the Student suffered severe anxiety and emotional disturbance secondary to his inability to perform in the traditional classroom. Dr. Poulos indicated he had prescribed straterra and prozac for the Student to deal with school phobia and his learning disorder.
48. Dr. Poulos did not testify at the due process hearing. He did not talk to the Student's teachers or other school personnel. The letter seems to indicate that he didn't conduct any testing himself regarding ADHD or dysgraphia. Apparently, he relied on Dr. Couvillion's evaluation or the Mother's report to him about Dr. Couvillion's testing.
49. A CCC meeting was held on January 14, 2004 and was attended by the Parents, the Student's private tutor, Dr. Couvillion, the second grade teacher, assistant principal, principal, the LD teacher, and Ms. Kroeger.
50. In addition to Dr. Couvillion's report and comments, the CCC also considered the letter from Dr. Poulos and input from the Student's current second grade teacher, the Student's private tutor, parental input, and the Student's grades and test scores, I.Q. and achievement levels. The school psychologist was not present because the parents insisted that he not participate in further educational decisions by the School.
51. The Student's second grade teacher reported to the CCC that the Student was reading and comprehending above grade level in both his instructional and independent level and that his handwriting was legible and improving as he focused on it. The teacher thought his printing had shown improvement. In addition, she believed the medication had improved his ability to focus. She also reported that the number of letter reversals had decreased significantly since the beginning of the year.
52. The Student's September 15, 2003 Terra Nova standardized test scores were discussed at the CCC meeting. Overall performance on the three (3) general content areas was excellent. The Student earned the ISTEP+ equivalent of a Pass in reading, just one point short of the Pass Plus designation. He scored in the 88<sup>th</sup> National Percentile for reading.

53. The Student's scores in Language Arts and Math on the Terra Nova fall into the ISTEP+ equivalent of a Pass Plus. His "writing process," "writing applications," and "language conventions" scores were all perfect at 100%. He scored in the 86<sup>th</sup> National Percentile for Language Arts and 98<sup>th</sup> National Percentile for math. The Student had no "areas of need" in reading or language.
54. The Student's grade equivalents for his Terra Nova test scores were all well above the second grade level.
55. The Student's grades at the time of the January 14, 2004 CCC were reading "B," English "A-," and handwriting "S".
56. The Student's private tutor noted improvements in the Student's handwriting.
57. The CCC found the Student ineligible under Article 7 for a Learning Disability. The CCC concluded that he did not have a severe deficit in perceptual, integrative or expressive processes involved in understanding or in using language, spoken or written that adversely affected the Student's educational performance.
58. The Student's GEI was amended to add two (2) additional interventions.
59. On January 15, 2004, the Parents filed a request for a due process hearing. On January 16, 2004, the Mother sent the second grade teacher a letter saying that she and her husband thought she was an excellent second grade teacher.
60. Subsequent to this letter, during the discovery phase of the due process hearing a school document that the second grade teacher never intended the Mother receive was exchanged. The teacher wrote in her own notes that it was her opinion that the Mother was happy when there was a problem and wanted the Student to have issues which needed to be dealt with (at school).
61. On April 12, 2004, the Mother wrote a hostile and critical letter to the 2<sup>nd</sup> grade teacher. (Pet. Ex. Pp. 465-468). In the letter the Mother wrote: "It is the school's responsibility to help an 8 year old boy who is hhD [sic] and dysgraphic receive an appropriate education. At the very least no one is to hurt him anymore than they already have—emotionally or educationally. He has school phobia and very limited coping skills. Please show some compassion and do not sabotage my sons recovery anymore... Please, just for this last 9 weeks leave your "agendas" at home and show some concern for the Student."
62. It is evident that after this letter was received by the teacher that her relationship with the Mother has not been very positive. However, the teacher

did not respond to the letter, and said the Student enjoys her class and she enjoys him very much.

63. At the due process hearing on March 15, 2004, the second grade teacher reported that the Student has greatly improved in his ability to focus since the beginning of the school year. She said he occasionally needs to be redirected but he is much better than at the start of the school year.
64. At the due process hearing on March 15, 2004, Mr. Chip Calwel, who holds a masters degree in counseling from Indiana State University and works with students who have dyslexia and school phobias, testified that he saw the Student twice for counseling for around a total of two (2) hours beginning two (2) weeks before the hearing. The Parents told Mr. Calwel that the Student was experiencing a lot of distress and anxiety. They also told him that the Student had a school phobia. Mr. Calwel did speak to the second grade teacher who said she did not observe any symptoms of school phobia or anxiety at school. Mr. Calwel thought the Student was depressed and anxious.
65. The principal has been providing the Student keyboarding instruction since the end of January (this was added to his GEI). The private tutoring sessions were discontinued at the school. She said that the Student is happy in her sessions with him and always gives her a hug.
66. At the due process hearing in late April, the second grade teacher reported the Student's current grades: "B" in reading, "A-" in English, "A" in math, "S+" in Science, Social Studies, and Health. The Student did not receive a grade in handwriting because he uses the computer for written work. His second nine weeks grade was a "S" for handwriting.
67. Both the principal and his second grade teacher believe that the Student's handwriting has improved and is within the norm for second grade.
68. The Student's first grade teacher, second grade teacher, the principal, assistant principal and the school psychologist do not believe the Student needs special education services to succeed in the general education classroom. None of them have observed the Student showing any signs of school phobia. To the contrary, he is quite happy at school.
69. School personnel are concerned that the Mother has told the School that the Student must be allowed to call her whenever he wants to during school. The Mother has begun coming to School and taking the Student out of school to go to the private tutor for tutoring during school hours. The Principal is concerned about the Mother's emotional health when she visits the School and she has told the Father about her concerns.

70. The second grade teacher has recommended the Student be placed in the new gifted, multi-grade level classroom for next year, his third grade year. The recommendation is based on his I.Q., test scores and classroom performance.

*The IHO's Conclusions of Law*

Based upon these Findings of Fact, the IHO reached six (6) Conclusions of Law.

1. The School did not fail in its “child find” duties to timely and properly evaluate the child and timely and properly identify the child as being in need of special education or related services.
2. The School did not fail to devise an appropriate IEP for the child. The CCC correctly determined that the Student is not eligible for special education and related services under Article 7. The Student does not need special education as a result of his disability, to the extent he has any disability including ADD.

The Student does not qualify as a student with a disability under Article 7 because to the extent he has a disability, it certainly does not adversely affect his educational performance, and he does not need special education and related services. The Student’s GEI provides minor accommodations that are more than adequate to assist the Student in the general education classroom.

3. The School does not need to reimburse the Parents for tutoring and transportation expenses since the Student is not eligible for special education under Article 7.
4. The School did fail to share the child’s initial evaluation with the Parents five (5) days prior to the CCC meeting. They received the evaluation one day before the CCC meeting. However, the Parents were given an opportunity to postpone the meeting two (2) days before it was scheduled. The Parents chose not to wait and the CCC meeting was held. The Parents waived their right to receive a copy of the evaluation five (5) instructional days before the CCC meeting. The Parents were in no way harmed, prejudiced or seriously hampered in their opportunity to participate in the formulation process. The Student was not denied a free appropriate education.
5. The School did not fail to give the Parents prior written notice about the reasons why their various requests for educational testing, services and placement were denied.
6. The Parents are not entitled to compensatory education services. The Student is not eligible for special education under Article 7.

### *The IHO's Orders*

Based on the Findings of Fact and the Conclusions of Law, the IHO issued the following order:

1. The School should continue to implement the current GEI.

The IHO properly notified the parties of their respective administrative appeal rights.

## **APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS**

### **Procedural History of the Appeal**

The Indiana Department of Education received the Student's Petition for Review on June 18, 2004. On June 22, 2004, the School requested an extension of time in which to file its Response to the Petition for Review. The Board of Special Education Appeals (BSEA) granted this request by an order dated June 23, 2004, granting the extension of time to file its Response to July 28, 2004. The timeline for review and issuance of the decision of the BSEA was extended to August 27, 2004. On July 8, 2004, the BSEA established August 13, 2004, as the date for review and issued a Notice to this effect. The Review would be conducted without oral arguments and without the presence of the parties. On July 28, 2004, the School timely filed its Response to the Petition for Review.

### **Student's Petition for Review**

As noted *supra*, the Student, without counsel (*pro se*), timely filed his Petition for Review on June 18, 2004. The Student believes the IHO's decision is contrary to law, which can be supported by substantial evidence. The Student takes exception to the following Findings of Fact: Nos. 7, 9, 10, 11, 14, 15, 16, 17, 20, 21, 24, 25, 26, 28-30, 32, 33, 34, 36, 44, 45, 46, 48, 50, 51, 52, 53, 54, 57, 62, 63, and 64. The petition did not specifically identify conclusions of law, the Student's objections related to Conclusions of Law Nos. 2 and 3.

Other than the School's psychologist, whose evaluation report the Student felt was inaccurate, the Student argues that the School failed to provide "qualified professionals" as defined under 511 IAC 7-17-61. Since the School's personnel involved with the Student testified that they did not have any specialized training in the area(s) of the Student's alleged disabilities and/or licensure in the area of special education, the Student argues that without the appropriate specialized training or licensing the School's personnel involved in the matter would not meet the requirements of a "qualified professional," and therefore are not skilled to accurately assess the Student.

Furthermore, the Student argues that the School and the IHO ignored the recommendations of legitimate "qualified professionals" including: the Independent

Evaluator; the family therapist; and the Student's pediatrician, and for that reason the Student was found ineligible to receive special education services. Therefore, the Student argues that more credence should have been given to the Student's "qualified professionals'" recommendations when the IHO made his decision (which although not specifically cited relates to Conclusions of Law Nos. 2 and 3). The Student concludes that based on the recommendations her child should have been eligible for services under: Learning Disability (due to dysgraphia), Emotional Disability (due to anxiety and severe depression), and Other Health Impairment (due to attentional issues). Contrary to the IHO's decision, the Student maintains that his disabilities do adversely affect his educational performance.

The Student argues that the second grade instructional assistant, who was named as one of the School's witnesses, was present during the hearing. The Student claims that the integrity of the hearing was jeopardized because of a direct violation of the Separation of Witnesses.

### **School's Response to the Petition for Review**

The School timely filed, on July 28, 2004, its Response to the Student's Petition for Review. The School argues that the IHO's decision was neither arbitrary nor capricious and was supported by substantial evidence. The School argues that the IHO correctly determined that the Student is ineligible for special education and related services under the Individuals with Disabilities Education Act (IDEA) and 511 IAC 7-17 *et seq.* ("Article 7") given that 1) the student is making academic progress; 2) the student is working above grade level; 3) the student does not need special education and related services to be successful in school; and 4) the student's needs are being met through an effective general education intervention plan. Furthermore, the School maintains that their staff are educated, experienced, and dedicated professionals.

Since the Student failed to specifically identify the Conclusions of Law to which he takes exception, the School maintains that the Student's Petition for Review is deficient. Therefore, the School argues that pursuant 511 IAC 7-30-4(d) and (g) the BSEA should dismiss the appeal for failure to cite specific Conclusions of Law alleged to be in error. The School maintains the IHO's Findings of Fact are supported by substantial evidence in the record and should be upheld. Additionally, instead of claiming that the Findings of Fact were erroneous, the School maintains that the Student simply claimed that they were incomplete. Therefore, the School claims that incompleteness of factual findings is not a ground for reversal.

The School maintains that there was no evidence presented that the second grade instructional assistant discussed what happened in the hearing with anyone. The School claims that the instructional assistant's appearance at the hearing was inadvertent and the School was not planning on calling her as a witness once they learned of her presence at part of the session.

## **REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS**

On August 13, 2004, the BSEA convened in Indianapolis for the purpose of conducting its review of this matter. All three members appeared. Based upon the record as a whole, the requirements of state and federal law, the Petition for Review, and the Response thereto, the BSEA now decides as follows.

### **COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The Student timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).
2. The IHO's Findings of Fact Nos. 7, 9, 10, 11, 14, 15, 16, 17, 20, 21, 24, 25, 26, 28-30, 32, 33, 34, 36, 44, 45, 46, 48, 50, 51, 52, 53, 54, 57, 62, 63, and 64 are supported by substantial evidence in the record and are not arbitrary or capricious or an abuse of discretion.
3. The IHO's Conclusions of Law are supported by the Findings of Fact and are not contrary to law.
4. The evidence and testimony support the IHO's determination that the Student does not qualify as a student with a disability under Article 7 because to the extent he has a disability, it does not adversely affect the Student's educational performance and the Student does not need special education and related services.
5. The IHO's decision is not contrary to law, an abuse of discretion, or unsupported by substantial evidence.

### **ORDERS**

In consideration of the foregoing, the Board of Special Education Appeals rules as follows:

1. The IHO's decision is affirmed in its entirety.

2. Any allegation of error in the Petition for Review not specifically addressed above is deemed denied.

DATE: August 13, 2004

/s/Richard Therrien  
Richard Therrien, Chair  
Board of Special Education Appeals

### **APPEAL RIGHT**

Any party aggrieved by the decision of the Board of Special Education Appeals has the right to seek judicial review in a civil court with jurisdiction within thirty (30) calendar days from receipt of this written decision, as provided by I.C. 4- 21.5-5-5 and 511 IAC 7-30-4(n).